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10 Attorneys for Defendant  
11 KEVIN FAGAN

12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF NEW YORK

14 UNITED STATES OF AMERICA,  
15 Plaintiff,  
16 v.  
17 KEVIN FAGAN,  
18 Defendant.

NO. 14-CR-632(JMA)

**DEFENDANT'S TRIAL BRIEF  
RE ADMISSIBILITY OF  
STATEMENTS PURSUANT TO  
FRE 803(3)**

19 Defendant Kevin Fagan, by and through his attorney of record, Assistant Federal  
20 Defender Chase Scolnick, will and hereby does file this motion to admit his statements  
21 pursuant to Federal Rule of Evidence 803(3).

22 Respectfully submitted,

23 DAVID PATTON  
24 Federal Defenders of New York  
25 Attorney for Defendant  
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Dated: May 5, 2015

By S  
CHASE SCOLNICK  
Assistant Federal Defender

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4  
5 Mr. Fagan seeks to admit evidence, through the government's case agent,  
6 regarding a text exchange that Mr. Fagan had with his cousin while he was in St.  
7 Lucia. During this conversation, Mr. Fagan explained that he was in St. Lucia and  
8 was planning to travel to New York to surprise his son.

9  
10 This testimony is relevant because it tends to show that Mr. Fagan acted in  
11 conformity with his plans to travel to New York to visit his son, whose birthday was  
12 several days after Mr. Fagan's arrival in New York, and helps to establish that he did  
13 not have the requisite intent to violate the charged offenses. His declarations are  
14 admissible under Federal Rule of Evidence 803(3), as well as the *Hillmon* doctrine<sup>1</sup>, as  
15 statements of his present and future intent, understanding, and plan.

16  
17 **II.**

18 **MR. FAGAN'S DECLARATIONS ARE RELEVANT AND ADMISSIBLE**  
19 **EVIDENCE OF HIS INTENT**

20  
21 Rule 803 of the Federal Rules of Evidence provides that

22 "[a] statement of the declarant's *then existing state of mind*,  
23 *emotion, sensation, or physical condition (such as intent,*  
24 *plan, motive, design, mental feeling, pain, and bodily*  
25 *health), but not including a statement of memory or belief to*  
26 *prove the fact remembered or believed . . ."*

27  
28  

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29 <sup>1</sup> See *Mutual Life Insurance Co. V. Hillmon*, 145 U.S. 285, 299, 300 (1892)

1 is “not excluded by the hearsay rule.” (emphasis added). This exception is based  
2 on the Supreme Court’s decision in *Mutual Life Insurance Co. V. Hillmon*, 145  
3 U.S. 285, 299, 300 (1892), which ruled that evidence that a missing person had  
4 stated his intention to go on a trip with Hillmon was admissible because such a  
5 statement is:

6  
7 Evidence that, shortly before the time when other  
8 evidence tended to show that he went away, he had  
9 the intention of going, and of going with Hillmon,  
10 which made it more probable both that he did go and  
11 that he went with Hillmon than if there had been no  
12 proof of such intention.

13  
14 *United States v. Persico*, 645 F.3d 85, 100 (2d Cir. 2011) (quoting *Hillmon*, 145  
15 U.S. at 296). If relevant, such a statement may be introduced to prove that the  
16 declarant thereafter acted in accordance with the stated intent. *Id.* (quoting  
17 *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000). Indeed, relevant  
18 declarations that fall within the parameters of this rule are *categorically*  
19 admissible, “even if they are self-serving and made under circumstances which  
20 undermine their trustworthiness.” *United States v. Lawal*, 736 F.2d 5, 8 (2d Cir.  
21 1984) (citing *United States v. DiMaria*, 727 F.2d 265 (2d Cir. 1984) (emphasis  
22 in original).

23  
24 Here, Mr. Fagan’s statements to his cousin regarding his intent to travel to  
25 New York to surprise his son are admissible. The statements are expressions of  
26 his *intent* to travel to New York in furtherance of his *plan* to surprise his son for  
27 his birthday. *See* Fed. R. Evid. 803(3). These statements were made shortly  
28

1 before his departure—the night before he purchased his plane ticket to New York  
2 and less than 48 hours before his departure—and are inherently reliable.

3  
4 These statements are relevant because they tend to show that Mr. Fagan  
5 lacked the specific intent necessary to violate the charged offenses. The  
6 government has alleged that Mr. Fagan traveled to New York on a planned “drug  
7 trip.” That he planned to travel to New York for a different, innocent purpose  
8 tends to show that he acted in conformity with these plans and that he did not  
9 plan to import narcotics.

10  
11 Moreover, the statements are also corroborated by other evidence. Mr. Fagan  
12 was traveling to New York on November 27<sup>th</sup>. His son does, in fact, live in New  
13 York, a short distance from the airport. His son’s birthday December 2<sup>nd</sup>, and Mr.  
14 Fagan’s return flight did not leave New York until December 8, 2014.

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17 Respectfully submitted,

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22 Attorney for Defendant  
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